party against whom it operates. Before anyone can be estopped by negligence, he must owe a duty to use due care towards the party misled, or towards the general public of which he is one. I found the plaintiff owed no duty of care to the defendant or to the general public when she deposited her title deeds with the firm of Abdullah Alsagoff & Co.

In the result, I declared the registered mortgage deed null and void, directed the Registrar of Deeds to cancel the registration of the mortgage, and ordered the defendant to hand over to the plaintiff all title deeds received by the defendant on the execution of the mortgage. I dismissed the counterclaim, and ordered the defendant to pay the plaintiff the costs of the claim and counterclaim on the higher scale.

Registered mortgage deed declared null and void. Counterclaim dismissed.

Solicitors:—*Mallal & Namazie; Eber & Tan.*

CHINA INSURANCE CO. LTD. v. NG SIAK YOW & ORS.

[A.C.J. (Gill J.) May 25, 1963]

[K.L. — Civil Appeal No. 423 of 1962]

Road Traffic—Insurance—Third Party risks—Notice of claim—Whether "notice of proceedings"—Road Traffic Ordinance, 1958, s.80.

The solicitors of the respondents, who had been injured in a road accident involving the owner who was insured with the appellant company, wrote a letter to the owner on June 16, 1958 claiming damages from him. In accordance with section 80 of the Road Traffic Ordinance, 1958 they on the same day sent a letter to the appellants, enclosing a copy of the letter sent to the owner, and also asking if liability was admitted. The letter to the owner read: "We are instructed to claim damages from you in respect of our client's injuries. Please let us know if liability is admitted." On October 14, 1961 the respondents obtained a judgment against the driver of the owner for the sum of $600 and costs. On the appellants refusing to satisfy the judgment, the respondents brought the present proceedings pursuant to section 80 of the Road Traffic Ordinance for the recovery of that sum from the company. The appellants contended that they were not liable as no notice of proceedings were given to them pursuant to section 80 of the Ordinance. The learned Magistrate decided against the appellants. On appeal:

Held: the letter of June 16, 1958 was a notice of claim and not a notice of proceedings as required by section 80 of the Ordinance. *Ceylon Motor Insurance Association Ltd.* v. *P. P. Thambugala*(2) considered.

Cases cited:—

(1) *Weldrick* v. *Essex and Suffolk Equitable Insurance Society Limited* (1950) 83 Ll.L.Rep. 91.

(2) *Ceylon Motor Insurance Association Ltd.* v. *P. P. Thambugala* [1953] 3 W.L.R. 486, P.C.

MAGISTRATE'S CIVIL APPEAL.

Khoo Eng Chin for the appellants.

Alexander Lee for the respondents.

Cur. Adv. Vult.

Gill J.: This is an appeal from a decision in a civil action in the Magistrate's Court at Kuala Lumpur given on the 9th day of November, 1962, whereby judgment in the sum of $600 and costs was entered against the appellants in favour of the respondents. The action was brought under the provisions of section 80 (1) of the Road Traffic Ordinance, 1958 (to which I shall henceforth refer as "the Ordinance") to enforce a judgment of the Sessions Court, Kuala Lumpur in favour of the respondents on a claim for damages in respect of personal injuries sustained by the respondents in a road accident involving Motor Car B4230, which at the material time was driven by one Abdul Aziz bin Rajab with the permission and consent of the owner, Mohamed Nizamudin bin Abdullah.

The facts of the case are as follows. On 4th April, 1958 Motor Car B4230 ran into the respondents as they were standing on the grass verge on the right hand side of Ipoh Road, Kuala Lumpur, facing Kuala Lumpur, as a result of which they sustained personal injuries. On 16th June, 1958 the respondents' solicitors wrote a letter to the owner of the car informing him that they were instructed to claim damages from him in respect of their clients' injuries and asking him to let them know if liability was admitted. On the same day a letter was sent to the appellants as the insurers of the car, enclosing a copy of the letter sent to the owner and also asking them if liability was admitted. There was no reply either from the owner of the car or the appellants, nor were any further letters sent to the appellants. On 9th January, 1960 the respondents brought an action for damages for personal injuries in the Sessions Court at Kuala Lumpur, being Civil Action No. 69 of 1960, against Mohamed Nizamudin and Abdul Aziz as the owner and the driver respectively of the motor car. The Sessions Court on 14th October, 1961 gave judgment against the driver Abdul Aziz for a total sum of $600 and costs, and apparently made no order against the owner Mohamed Nizamudin. The appellants as insurers either failed or refused to satisfy this judgment in compliance with the provisions of section 80 (1) of the Ordinance, whereupon the respondents filed an action against them in the Magistrate's Court at Kuala Lumpur on 23rd March, 1962.

At the trial of the action in the Magistrate's Court the parties chose to call no evidence and the case proceeded on arguments by learned

counsel. It was contended on behalf of the appellants that they could be made liable only if they had been given a notice of the proceedings as required by section 80(2)(a) of the Ordinance. It was argued on the authority of *Weldrick* v. *Essex and Suffolk Equitable Insurance Society Limited*[1] that the letter dated the 16th June, 1958 sent to them by the respondents' solicitors was not a proper notice. The respondents, on the other hand, argued on the authority of *Ceylon Motor Insurance Association Ltd.* v. *P. P. Thambugala*[2] that it was a proper notice. At no stage of the proceedings was it suggested that the driver of the car was not an insured person within the meaning of section 80 (1) of the Ordinance. In the event the Magistrate decided in favour of the respondents and gave judgment against the appellants. It is against that decision that the appellants have now appealed.

The only question to be decided in this appeal is whether the letter of 16th June, 1958 was a sufficient notice under section 80(2)(a) of the Ordinance so as to make the appellants liable. This section reads:

"No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceeding;".

In the *Weldrick* case the question arose whether a notice in the following terms was a sufficient compliance with section 10(2)(a) of the English Road Traffic Act, 1934, the terms of which are almost identical with section 80 (2)(a) of the Ordinance:

"We understand your Society has repudiated liability, and we shall be grateful to have your confirmation thereof in writing, because you will appreciate, we shall have to take proceedings as against Mohamed, and as against the owner of the other vehicle, and at the same time give notice to the Motor Insurers Bureau of your repudiation of liability."

It was held that it was not. Birkett, J., said in that case (at p. 102).

"....where there is a statutory requirement of this kind, it must be pretty strictly fulfilled. There is no evidence really before me that the defendants in this case ever did have notice of the proceedings, either before or within seven days after they had been brought. What they did have was an intimation that in certain circumstances proceedings might be brought, but not necessarily that they would be brought. This point has been called a technical point, and I suppose it is, but I think I must come to the conclusion upon the technical matter that the requirements of section 10 have not been fulfilled inasmuch as the insurer did not have notice of the bringing of the action."

In the *Thambugala* case, a case from Ceylon, the notice was in the following terms:

"Re Car No. X-4851.

We are instructed by Mr. P. P. Thambugala of.... to file an action for the recovery of Rs. 15,000 against Mr. Kodituwakku Aratchige Stephen Perera of..... being damages sustained by our client as a result of the above car knocking down our client on September 1, 1945, by reason of the negligent and careless driving on the part of his driver.

We are given to understand that the above car has been insured with your company.

Our client is still under treatment and unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car."

The District Judge held that this was sufficient notice under section 134 of the Motor Car Ordinance, No. 45 of 1938, which bears a resemblance to section 10(2)(a) of the English Road Traffic Act, 1934, and gave judgment for the respondent for the sum claimed. His decision was affirmed by the Supreme Court of Ceylon. On further appeal to the Privy Council it was held that the name and address of the proposed plaintiff, the name of the owner of the car and its number, the date of the accident and the sum claimed as damages in the letter of May 21, 1946 were elements which, taken together, constituted it a sufficient notice of action under section 134 of the Ordinance.

The main argument before the Privy Council in the *Thambugala* case was that the letter of May 21st, 1946 should have contained the name of the court in which it was proposed to file action, because an action cannot be specified with precision without reference to its number and to the name of the court in which it is filed. But Their Lordships pointed out that as section 134 contemplates the possibility of giving notice before the action was filed, in that event no number could be given. It followed therefore that the section contemplates something containing less than a precise specification of the action. Their Lordships also referred to the *Weldrick* case which in their view did not help the appellant. They agreed with the District Judge that the main purport of the letter in that case was to obtain confirmation of an alleged repudiation of liability and that it was not possible to say that it was a proper notice complying with the provisions of section 10(2)(a) of the Road Traffic Act, 1934.

In the present case the material portion of the letter dated 16th June, 1958 was in the following terms:

"We are instructed to claim damages from you in respect of our client's injuries. Please let us know if liability is admitted."

To my mind this was nothing more than an intimation that a claim was being made and an inquiry as to whether liability was admitted. It is to be observed that in the *Thambugala* case there was a proper notice of action. I therefore

cannot see how it can possibly be argued that the decision in that case helps the respondents in this case. Section 80(2)(a) contemplates the giving of notice of the proceedings in which the judgment was given. In my opinion there can be no notice of such proceedings unless it is stated in unequivocal terms that the parties intend to file an action for the recovery of damages. The notice in this case was not a notice of action but a notice of claim, which is not the same thing as a notice of action.

It has been argued on behalf of the respondents that when damages are claimed the ultimate result must necessarily be an action. With respect that may not always be the case. If, for instance, the claim is admitted there may be no action. In any event, if the ultimate result contemplated is an action, it must be so stated in the letter so as to leave no doubt in the mind of the insurer. As stated in Halsbury, 3rd Edition, Volume 22, page 376, paragraph 770, "the notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings, but no particular formality is required, nor is there any need to plead the giving of notice." If the letter in this case had gone on to say that action would be brought if liability was not admitted or no reply given by a certain date or within so many days, or words to that effect, it would have been a proper notice. I do not think that an experienced and astute solicitor would draw up a notice of action in the terms in which this letter was couched.

It is to be observed that section 80(3) of the Ordinance enables the insurer to obtain a declaration of non-liability on certain grounds in legal proceedings instituted for the purpose, provided that they are instituted before the expiration of a specified period and provided, in certain circumstances, that notice is given of the proceedings by the insurer to the injured party within a prescribed time. One of the objects, though not the sole object, of the notice of proceedings under section 80(2)(a) of the Ordinance is to enable the insurer to institute his proceedings under section 80(3) of the Ordinance within time.

In all the circumstances of the case and in view of what I have stated above, I am of the opinion that the learned Magistrate was wrong in holding that the appellants as insurers had had a notice of the proceedings against the insured, and consequently in giving judgment against them. Therefore the appeal is allowed and the judgment of the Court below reversed. There will accordingly be an order that the judgment of the Magistrate be set aside and that the action before him do stand dismissed. Before concluding the matter, however, I must say that I allow this appeal with very great reluctance and because I feel that I have no option but to do so. The respondents have my profound sympathies, because it seems to me that they find themselves in the position in which they are because the letter written on their behalf to the appellants did not contain a few more words so as to make it a proper notice under the Ordinance. The respondents will also have to bear the costs of this appeal and of the action in the lower Court, and I make an order accordingly.

Appeal allowed.

Solicitors:—*Khoo Eng Chin & Co.; Skrine & Co.*

RE P. W. AU-YONG; *EX-PARTE* M. DICUM

[O.Bk.J. (Gill J.) June 3, 1963]

[K.L. — In Bankruptcy No. 34 of 1963]

Bankruptcy—Counter-claim by debtor—Indorsement on Bankruptcy Notice regarding counter-claims and set-offs—Affidavit of such to be filed within seven days—Failure to file—Whether counter-claim could be set up as defence to oppose Bankruptcy Notice.

Practice and Procedure—Personal service of Bankruptcy—Notice evaded by debtor—Order made for substituted service—Order that copies of notice and of order be posted—Argument by debtor that this did not comply with rules 95 and 107 of Bankruptcy Rules 1921—Whether substituted service bad.

After three unsuccessful attempts by a process server of the court to serve on the debtor a Bankruptcy Petition obtained by the petitioning creditor, the latter obtained an order for substituted service which read, "the Bankruptcy Notice on the debtor be served by posting copies of the notice, together with copies of the order for substituted service on the notice boards of the Supreme Court and the Magistrate's Court and on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence." Service in this form was duly effected.

The debtor opposed the Bankruptcy Petition on the ground that the Bankruptcy Notice was not duly served on him because it did not bear the seal of the court and the signature of the Registrar under whose hand it was issued, and that such service was contrary to rules 95 and 107 of the Bankruptcy Rules, 1921.

Held: (1) rules 95 and 107 of the Bankruptcy Rules 1921 would have been applicable if the service had been personal service. The service effected in the case was substituted service and such service must be in accordance with the terms of the order made for substituted service.. The service made complied with the terms of the order and was therefore good;

(2) with regard to the ground raised by the debtor that he had a counter-claim against the petitioning creditor which exceeded the amount claimed in the Bankruptcy Notice the debtor should have applied within seven days of the service of the Bankruptcy Notice to set it aside in accordance with the endorsement on the notice. His failure so to do left no merit in this ground.

Cases referred to:—

(1) *In re G. E. B. Homer, a Debtor* [1903] 2 K.B. 340, 349.